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WATER RIGHTS PREFERENCE SYSTEMS

Introduction

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A preference system is also a method for allocating water. It establishes a water right priority system based on the type of use to which the water will be applied. Water uses are ranked and those which are more preferred receive water prior to uses with a lower preference.

There are several types of preference systems as well as miscellaneous preferences scattered throughout Montana water statutes. These include: absolute or real preference systems, condemnation and compensation powers given to preferred uses, reservations for future use, and systems for rationing water in years when water is in abnormally short supply. Each type of preference will be explained, its use in Montana will be identified, and the respective advantages, disadvantages, and practical workability problems of each will be duscussed.

Absolute or True Preference Systems

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greater usability and commercial value, including steam generation of power, (3) irrigation, (4) mining and the recovery of minerals, (5) hydroelectric power, (6) navigation and (7) recreation and pleasure (Tex. Stat. Rev. Civ. art. 7471 /1948/).

Condemnation Powers of Preferred Users

Another type of preference system is one which gives preferred uses the power to condemn and pay for an existing water right in a less preferred use. The state constitutions of Nebraska and Idaho establish classes of preferences for the use of water and allow preferred uses to condemn and purchase rights of lower ranked uses. Other western states do not establish such a comprehensive system; however, the right of municipalities to condemn existing rights is almost universally recognized.

Reservations

A third type of preference system is a system of reservations or right to appropriate water for a future use. For example, in Colorado and California municipalities may apply for a permit for water in excess of current needs to satisfy future expansion. Reservations are a type of preference system whereby water may be reserved for projects and/or for use by public bodies before the need actually arises.

Preferences in the Water Short Years

Preference systems can be designed to operate in short water years to ration abnormally low flows between existing appropriators. Statutes can govern apportionment of limited supplies or informal agreements between appropriators can accomplish the same result.

Examples of Preference Systems in Montana Water Law

Montana water law contains scattered examples of preference systems and preferences in the use of water. However, many of these are not comprehensive, and only govern limited areas of water management and use. Each of the previously discussed types of preference systems and its respective occurrence in Montana water law will be identified.

Real or Absolute Preference Systems in Montana Law

There are two readily apparent examples of real preference systems which are relevant to Montana. The first--controlled groundwater areas--is statutorily created. The second example of an absolute preference system was proposed in SB 359, which was introduced in the 1977 Legislature, but not passed. It will be discussed because it is illustrative of a type of preference system which is intermittently proposed and considered.

Controlled Groundwater Areas

The Board of Natural Resources may establish a controlled groundwater area as described in the MCA 85-2-506 and 85-2-507. The DNRC by it own motion, or the affected users by petition, may propose the formation of a controlled groundwater area based on the following alleged facts: that groundwater withdrawals in an area are in excess of aquifer recharge; that excessive groundwater withdrawals are expected in the future; that significant disputes exist among area appropriators as to the priority, amounts, and types of use; and that levels or pressures of groundwater have declined excessively. If the Board, after holding a public hearing, concludes that any of the alleged facts are true; that the public health, safety, or welfare requires a corrective control be adopted; that there is wasteful use of water from existing wells, or undue interference with existing wells;

and that any proposed use will interfere with existing rights to appropriate surface or groundwater by others, it may by order declare the area in question to be a controlled groundwater area.

The order may include such corrective measures as: closing the area to further appropriation; determining a total permissible withdrawal of groundwater and apportioning that amount of water among appropriators; establishing a "provision according to preference, without reference to relative priorities, to withdrawals of groundwater in the controlled area for domestic and livestock purposes first and thereafter to withdrawals for other beneficial purposes" (MCA 85-2-507(c)); and a provision reducing total permissible withdrawal by any appropriator. The powers given to the Board to reorder priorities according to preferred types of use and to re-allocate water supplies among appropriators is an example of a true preference system.

To date, only one controlled groundwater area has been created. In November 1967, the Montana Water Resource Board formed the South Pine Controlled Groundwater Area in east Prairie County and portions of Wibaux and Fallon Counties.

SB 359

In the 1977 Legislature, SB 359 was proposed to establish a preference system for allocating water rights greater than 20 cfs or 14,000 acre-feet. But SB 359 was defeated on second reading in the House.

As it originally passed the Senate, SB 359 would have established a preference system which applied to water permits and reservations greater than 20 cfs granted after the enactment of the bill. According to Section 2(3) of the bill:

> The water rights of a holder of a permit or reservation in a given class are subject to future appropriation by a water user of a higher priority. Within a class, first in time is first in right. When a permit application is received for use in a given class, for purposes of the criteria of 89-885, the department shall consider as unappropriated any water in a lower use class held under a permit or a reservation which is subject to future appropriations under this section and the holder of such permit or reservation shall not be considered a prior appropriator.

Classes of preferred uses were ranked in the following order: (1) domestic and municipal use; (2) agricultural and irrigation use; (3) industrial use; (4) recreational and fish and wildlife use.

The House Judiciary Committee amended the bill so that water rights including permits and reservations within the Yellowstone River basin would be allocated according to a system of preferences. Rights existing prior to the enactment of the bill were not to be affected. The amended version of SB 359 also established a more detailed system of preferences.

Condemnation Powers of Preferred Users

Montana statutes, as do all statutes of appropriation states, allow cities and towns to condemn existing rights and compensate persons whose rights are taken (MCA 7-13-445). However, this right is seldom exercised in Montana. It may be possible that no municipality has ever condemned a private water right.

Reservations

The reservations granted by the Board of Natural Resources and Conservation are an example of this system's use in Montana. Because water is reserved for future use by such entities as conservation districts and municipalities, a type of preference has been established for future use of the water. Permits granted after the reservations are established are junior to the reservations even though use by the reservations will occur after the permitted use.

Preferences in Water Short Years

In Montana, this system has been used informally by agreement between water users. In order to avoid conflict and possible court adjudication, appropriators on nondecreed streams have reached a consensus among themselves as to sharing abnormally short water supplies. Appropriators along the Pondera Coulee in Pondera County have arrived at such agreements.

Other Preferences in Montana Water Law

Examples of preference systems which do not fall within the general types discussed can be found scattered throughout Montana statutes. According to MCA 85-1-122, appropriations of water for irrigation and domestic use upstream from the Cabinet Gorge Dam in Idaho on the Clark Fork River shall have priority over the use of water for hydropower generation.

The state of Montana has declared a nonpreference for the use of water to slurry coal and for the change in use of large agricultural rights to industrial use. Use of water for coal slurry is declared to be a nonbeneficial use of water (MCA 85-2-104(2)), and appropriators of more than 15 cfs may not change the purpose of a right from agricultural use to industrial use (MCA 85-2-402(3)).

A final example of a type of preference system in Montana law would be the order in which the Board adopted reservations on the Yellowstone. The Board adopted the order by classes of water use, with municipal reservations first, irrigation reservations, multipurpose reservations, and instream flow reservations last.

Analysis of Preference Systems

Preference systems have been considered as additions to or replacements of parts of Montana water law. Preference systems have both advantages

and disadvantages which must be assessed in order to determine their practical use in Montana. Each type of preference system will be reviewed.

Absolute Preference Systems--Advantages

The major advantage of an absolute preference system is that the new use of water can be prioritized according to uses considered most beneficial. For instance, if Montanans desire an agricultural based economy above all else, they may institute a preference system which assures that future appropriations will be available to agricultural uses above other uses. Similarly, if persons in this state wish to discourage a certain type of industry or use of water, an absolute preference system may be designed and enacted to reflect those beliefs.

Water as it is allocated under the appropriation doctrine or through the sale and transfer of water rights may not achieve the distribution desired by most citizens. For instance, industry can usually afford to purchase a water right held by agriculture user because the marginal value of water in an industrial process is much greater than the marginal value of water used to irrigate most types of crops which can be grown in Montana. While agricultural rights greater than 15 cfs may not be transferred to industrial uses, if water in lesser amounts is available, industrial uses will be guaranteed a supply if their major competitors to purchase it are agricultural interests. If it is important to the people of this state to preserve agriculture, and if there is inadequate water to support both agriculture and other industries, an absolute preference system may be able to assure that irrigators receive what remaining water is available.

One of the criteria which governs the issuance of water permits stipulates that the water be put to a beneficial use; however, all uses are considered equally beneficial. An absolute preference system ranks uses

in order of preference. Such a system would insure the uses considered the most beneficial would receive water prior to a use which is less preferred.

Disadvantages of Absolute Preference Systems

The most serious disadvantage of instituting an absolute preference system is that the existing beliefs about the use of water are legislatively locked into place. The respective preferences about the use of water may be outdated in a short while, possibly within a five-year span. In that instance, water management personnel and Montana water users would be locked into an inflexible system which no longer represented the most beneficial use of water.

On the other hand, a preference system could be re-prioritized by each legislature. If water were allocated according to a different system every two years, the resulting chaos and uncertainty would cause confusion, administrative nightmares and general disorientation for water users.

Absolute preference systems discourage investment in water resource development because they increase the uncertainty of a water right. If an appropriator knows that his right may be altered if a preferred user submits a permit which decreases or depletes water available to him, the appropriator will be less likely to make investments in water development.

Third party injuries can result from the enactment of and adherence to a preference system. Absolute preference systems are too rigid to allow a pattern of water allocation to respond to the interdependencies between industries and between industries and agriculture. Preference systems which seek to allocate water based on preferred classes of uses ignore the interrelated nature of a regional or state economy. A third party injury can result if a user with a higher ranked use depends on product inputs from users in lower valued uses. If water is re-allocated from the lower to the

higher valued uses, the preferred users can suffer losses even though they may continue to receive water. For instance, if agriculture is preferred to industrial use, and water is reallocated from industrial to higher priority uses, agricultural related industries are hurt. Should agricultural related industries such as food processing go out of business because of limited water availability, farmers and ranchers will also be hurt because the market for their produce has been weakened.

An absolute preference system may not establish an economically efficient allocation of water. Classes of use with the highest priority may not be those which can use the water most productively. If less preferred uses can afford to pay more for water than it is worth to users in a less preferred use, water could still be transferred to and utilized in less beneficial uses (provided the sale of water to lower valued uses were not banned).

Preference systems may have little impact in patterns of water allocation where water is already in short supply. Court cases in Colorado and Nebraska have held that preference systems cannot reorder or reprioritize existing rights.[1] Therefore, if existing water appropriation has already approached a maximum, preferences between future appropriations may accomplish very little. The goals for which the preference system was designed may have negligible impact on a highly appropriated stream.[2]

Not only have court cases in other states weakened the total impact of preference systems, but absolute preference systems may be unconstitutional

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[1]Frank Trelease, "Preferences to the Use of Water," Rocky Mountain Law Review, vol. 27, 1955, p. 153.

[2]Ibid., p. 160.

in appropriation states.[3] Furthermore, court cases have held that no statute can authorize destruction of existing rights without compensation.

Instituting an absolute preference system could prove to be an administrative migraine. Each time water was reallocated from a lower use class to a higher ranked class, users would have to be notified and the new water allocation would have to be enforced in order to assure that the new use received water.

The cost of educating the public about a new water allocation system could be tremendous.

The Subcommittee on Water Rights (1978) in its report to the 46th Legislature studied the use of preference systems in Montana and concluded "based on the fact that no clear need has been established for a preference system and the fact that the priority system could supersede the existing system only with difficulty, the Subcommittee decided not to consider the preference system further" (p. 20). Not only have various bodies in Montana evaluated absolute preference systems and decided they were not desirable, but most states which adopted preference systems were dissatisfied with those water allocation schemes.[4]

The final workability problem in designing a comprehensive preference system for Montana is drafting one which reflects the conditions across the state. Eastern and western Montana have different characteristics and industries which are important to each. Characteristics across river basins can also vary dramatically. It may not be possible to rank all water

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[3]Ibid.

[4]"Oklahoma Water Law, Stream and Surface Under the 1963 Amendments," Oklahoma Law Review, vol. 23, no. 1, February 1970, p. 47.

uses to fit the respective needs of each part of the state. For instance, agricultural uses may be a priority use above industrial use in eastern Montana, while industrial use for processing products of the lumber industry may be considered more beneficial than agricultural uses in western Montana.

Condemnation Powers of Preferred Uses--Advantages

The power of preferred uses to condemn rights in lower valued uses may be a more flexible system than an absolute preference system. Uses considered most beneficial could condemn and purchase existing water rights and thereby be assured of a water supply; however, water allocations would not be rigidly structured into one allocation pattern.

The powers given to municipalities to condemn and purchase existing rights reflects the widespread belief of the value of a domestic water supply. Most persons readily agree that the assurance of domestic water is the highest use of water. Therefore condemnation powers given to municipalities do not receive much opposition.

Disadvantages

The power to condemn and purchase less preferred rights may not guarantee that preferred users will be assured a supply of water. Preferences between uses may bear little relation to the economic value of water. Preferred users may be unable to compensate less preferred users. For instance, if agricultural use is preferred to industrial, farmers and ranchers may be unable to compensate an industrial user for the worth of the water as it is used in the industrial process.

The power of condemnation given to municipalities may not be economically rational, either. Preference rankings are based on the perceived average value of water and not on its marginal value. This misconception

is evident when domestic uses are placed at the top of the preference list. "People need at least a certain amount of water in order to live, and therefore value that initial amount quite dearly. However, water use for relatively luxurious purposes in the home are not valued nearly as much by many domestic users, while industry generally values water quite highly."[5]

If a condemnation type preference system is instituted, persons holding senior rights in less preferred classes of use may receive windfall gains from the sale of their rights to persons in higher ranked uses. The problem of windfall gains may be particularly troublesome on highly appropriated rivers.

Many of the same workability problems associated with instituting an absolute preference system would occur under a condemnation type preference system. The system could be outdated in a short while or changed so often as to cause vast confusion among water users and water managers. The same costs of public education and administrative enforcement could result.

Advantages of Reservations

Reservations have the advantage of assuring a water supply for future uses. Just as other preference systems attempt to insure that preferred uses will be able to receive water, so do reservations for future uses.

Montana has the further advantage in its reservation system of being able to review reservations periodically and modify the original reservation. Because reservations can be altered, this system does not lock water managers and water users into a rigid scheme of water allocation.

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[5]Jeff LaFrance, Water Resources Assessment Project, Montana Department of Natural Resources and Conservation, December 1978, p. 60.

Disadvantages of Reservations

Reservations for future use of water do not always allow the most economically efficient use of water to take place. Preferred uses of water may not produce the highest value in use.

Another disadvantage of reservations is that water is "locked up" for future use. During the interim, water cannot be put to beneficial use.

Reservations for future use have several practical problems. The difficulty of establishing what future uses are reasonable for different purposes can be a difficult task. The problems of data collection, availability, and interpretation can be aggravating--witness the Yellowstone reservation process.

Although it is probably desirable to have the citizen-manned Board of Natural Resources divvy up reservations for future use, it also imposes a large burden on them in terms of time and difficulty with technical information which is often hard for experts to assimilate.

Reservations also force persons to develop water supplies before the allotted time expires. Reservations may foster development of water before it is economically or practically necessary. Irrigators along the Yellowstone face this problem.

Advantages of Rationing Water in Short Water Years

In below-average water years, being able to ration supplies can guarantee that some needs of all appropriators are satisfied or that the most critical needs are satisfied. Systems--either legislated or informal--can help to avoid conflicts between appropriators when water is abnormally low.

The informal agreements which are often reached between Montana appropriators when water supplies are short has helped reduce the need for

legal solutions to conflicts. The informal agreements also allow water users to arrive at their own consensus as to how the water ought to be shared, rather than having a third party or outsider dictate local water use patterns.

Disadvantages of Water Rationing in Water Short Years

To the extent that one water user may suffer disproportionate losses compared to other water users bound by the same agreement, this sytem could be disadvantageous. If the system is one which is legislated rather than one arrived at by voluntary agreement, this disadvantage is more severe.

Enforcement of agreements which ration water may be difficult. The more an appropriator stands to gain by withdrawing more than the apportioned share, the greater the incentive to steal water. If devices to measure amounts of water diverted are not installed prior to the water shortage, there may be no way to judge compliance and enforce the water apportionment. Persons bound by informal agreements have no recourse to enforce them.

Summary

Preference systems of all types are incorporated into Montana water law. Adoption of even more comprehensive preference systems in the allocation of surface water is periodically suggested and considered in the legislature. Each type of preference system has unique advantages and disadvantages which should be considered prior to the actual enactment of such systems.